

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Time Warner Cable Entertainment – Advance/ Newhouse Partnership d/b/a Time Warner Cable	)	File No. CSB-A-0723
	)	
Appeal of Local Rate Order of the Cable Television Division, Department of Telecommunications & Energy, Commonwealth of Massachusetts for the Communities of Dalton, Pittsfield, and Richmond, MA	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 14, 2005**

**Released: July 15, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Time Warner Cable Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable (“TWC”) has appealed the September 21, 2004 Rate Order adopted by the Cable Television Division of the Department of Telecommunications and Energy of the Commonwealth of Massachusetts (“Cable Division”) denying TWC any external cost pass through for costs associated with a news and information channel created by a TWC affiliate.<sup>1</sup> The Cable Division has opposed this appeal,<sup>2</sup> and TWC has replied.<sup>3</sup> Based on the record as a whole, we deny the appeal.

**II. BACKGROUND**

2. Rate orders issued by a franchising authority may be appealed to the Commission.<sup>4</sup> In ruling on appeals, the Commission will not conduct a de novo review, but instead will sustain the

---

<sup>1</sup> Time Warner Cable Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable, Appeal of Local Rate Order and Request for Expedited Consideration (“TWC Appeal”) (filed Oct. 19, 2004). *Id.*, Ex. 1, Commonwealth of Massachusetts, Office of Consumer Affairs and Business Regulation, Dep’t of Telecommunications & Energy, Cable Television Division, Review by the Cable Television Division of the Dep’t of Telecomm. and Energy of Fed. Communications Comm’n Forms 1240 and 1205 filed by Time Warner Cable, Inc., CTV 03-4, Rate Order (Sept. 21, 2004) (“2004 Rate Order”).

<sup>2</sup> Cable Division, Opposition to Appeal of Local Rate Order (Nov. 3, 2004) (“Cable Division Opposition”).

<sup>3</sup> TWC, Reply to Opposition to Appeal of Local Rate Order (Nov. 9, 2004) (“TWC Reply”).

<sup>4</sup> 47 U.S.C. § 543(b)(5)(B); 47 C.F.R. § 76.944(b).

franchising authority's decision if it has a reasonable basis.<sup>5</sup> The Commission will reverse a franchising authority's decision only if it determines that the franchising authority acted unreasonably in applying the Commission's rules.<sup>6</sup> If the Commission reverses a franchising authority's decision, it will not substitute its own decision, but instead will remand the issue to the franchising authority with instructions to resolve the case consistent with the Commission's decision on appeal.<sup>7</sup>

3. After establishing initial basic service tier ("BST") rates, rate-regulated cable operators periodically adjust their rates for inflation, changes in external costs, including programming costs,<sup>8</sup> and changes in the number of regulated channels. Operators electing to use the Commission's annual rate adjustment methodology adjust rates no more frequently than once per year to reflect changes projected over 12 months and true up past projections with actual costs.<sup>9</sup> Any incurred cost that was not projected may be accrued with interest and added to rates at a later time. Commission rules govern rate adjustments for changes in costs of programming purchased from affiliated programmers,<sup>10</sup> require that increases in programming costs be offset on a channel-by-channel basis by revenues received from the programmer,<sup>11</sup> and allow a mark-up of 7.5% for increases in programming costs.<sup>12</sup>

4. Operators file justifications for rate adjustments using the annual rate adjustment methodology on FCC Form 1240, Updating Maximum Permitted Rates for Regulated Cable Services (July 1966), no later than 90 days before the effective date of the rate adjustment.<sup>13</sup> The franchising authority has 90 days from the date of the filing to review it. If the franchising authority has taken no action within the 90 day period, the proposed rates may go into effect and the franchising authority will have 12 months from the date of filing to review it and order a refund or a prospective rate reduction with respect to the filing.<sup>14</sup>

### III. DISCUSSION

5. Capital News 9-TWEAN News Channel of Albany, LLC ("TWC Affiliate"), which is "indirectly and wholly owned by Time Warner Entertainment-Advance/Newhouse Partnership,"<sup>15</sup> created and operates Capital News 9, a cable channel providing regional news and information programming for

---

<sup>5</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5731 ¶ 149 (1993) ("Rate Order"); 9 FCC Rcd 4316, 4346 ¶ 81 (1994) ("Third Reconsideration").

<sup>6</sup> *Rate Order*, 9 FCC Rcd at 5731.

<sup>7</sup> *Id.* at 5732.

<sup>8</sup> 47 C.F.R. § 76.922(f)(1)(v), (6)-(8).

<sup>9</sup> 47 C.F.R. § 76.922(e); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 FCC Rcd 388, 391-92, 413-23 (1995).

<sup>10</sup> 47 C.F.R. § 76.922(f)(6).

<sup>11</sup> 47 C.F.R. § 76.922(f)(7).

<sup>12</sup> 47 C.F.R. § 76.922(f)(8). Operators must reduce rates by decreases in programming expense plus an additional 7.5%. *Id.*

<sup>13</sup> 47 C.F.R. § 76.933(g).

<sup>14</sup> 47 C.F.R. § 76.933(g)(2).

<sup>15</sup> TWC Appeal at 1 n.2.

the Albany-Schenectady-Troy area. This area encompasses the Dalton, Pittsfield, and Richmond, Massachusetts communities served by TWC's Pittsfield cable system. TWC launched the Cable News 9 channel in October 2002, and TWC began carrying it on its Pittsfield system at that time.<sup>16</sup> TWC included projected costs for the channel in its FCC Form 1240 filed with the Division for its 2003 rate year. The Cable Division allowed TWC to recover the net book costs for the channel, even though it found that TWC had not met its burden of proof regarding the justification of the Capital News 9 costs under Commission affiliate transaction rules, and, therefore, had not established the reasonableness of the projected programming costs.<sup>17</sup> The Cable Division took this "tempered approach" because of the public policy favoring local programming, TWC's entitlement to some undetermined portion of the costs, and the true-up mechanism that would reconcile the permissible costs in TWC's next rate filing.<sup>18</sup> The Cable Division put TWC on notice that it "should be prepared [in its next filing] to justify any claimed actual costs associated with affiliated programming by either demonstrating a prevailing company price for that programming, or that costs claimed reflect the lesser of fair market value and net book costs."<sup>19</sup>

6. When filing its next FCC Form 1240 for the 2004 rate year, TWC had no marketplace price established for third parties so was unable to establish a prevailing company price for Capital News 9.<sup>20</sup> TWC did not establish a fair market value for the channel so could not compare the fair market value with net book costs. Instead, it adjusted its programming costs on the rate form based only on operating cost information for the channel.<sup>21</sup> After reviewing this FCC Form 1240, the Cable Division determined that TWC had not justified the external costs for the Capital News 9 channel in accordance with the affiliate transaction rules in sections 76.922(f)(6) and 76.924(i)(1) of the Commission's rules,<sup>22</sup> which require a showing of fair market value.<sup>23</sup> The Cable Division did not impute a fair market value, stating that TWC would not provide relevant information in response to the Cable Division's requests for such information.<sup>24</sup> Instead, the Cable Division disallowed the programming costs associated with the channel and directed TWC to resubmit its FCC Form 1240 in accordance with the Division's 2004 Rate Order and to file a refund plan.<sup>25</sup>

---

<sup>16</sup> Cable Division Opposition Ex. A, Commonwealth of Massachusetts, Office of Consumer Affairs and Business Regulation, Dep't of Telecomm & Energy, Cable Television Div., Time Warner Entertainment-Advance/Newhouse Partnership, Rate Order (Sept. 30, 2003) ("2003 Rate Order"), at 2; 2004 Rate Order at 5; TWC Appeal at 2 n.3. The channel carries Pittsfield news and has an office in Pittsfield. 2003 Rate Order at 2.

<sup>17</sup> 2003 Rate Order at 4-5. TWC was directed to recalculate the BST rate, offsetting programming costs by advertising revenue. *Id.* at 5.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> 2004 Rate Order at 9.

<sup>21</sup> *Id.* at 8. Although not providing invoices paid for Capital News 9, TWC had suggested to the Cable Division that the invoices be compared to the operating costs for the channel. Cable Division Opposition at 5 n.5 (arguing that a comparison of invoices to operating costs is not the standard under the Commission's rules); 2004 Rate Order at 8. The Cable Division also questioned whether the claimed operating costs were properly allocated. *Id.* at 11 n.12.

<sup>22</sup> See 47 C.F.R. §§ 76.922(f)(6), 76.924(i)(1).

<sup>23</sup> 2004 Rate Order at 11.

<sup>24</sup> *Id.* at 9-10 (TWC "consistently maintained that a fair market value analysis was unnecessary").

<sup>25</sup> *Id.* at 12.

7. TWC claims that the Cable Division erred in two ways: (1) by applying the wrong standard to TWC's cost showing; and (2) by disallowing all of TWC's claimed costs for Capital News 9 without prescribing permissible external costs. We disagree.

8. The Commission's rules allow a cable operator using the annual rate adjustment methodology to adjust its permitted charges to reflect experienced or projected changes in external costs,<sup>26</sup> including programming costs.<sup>27</sup> Because of concerns about possible abuses if vertically-integrated cable operators can engage in unlimited pass-throughs of programming costs to subscribers,<sup>28</sup> the Commission adopted special provisions governing the external cost treatment of programming purchased from affiliated programmers. These provisions are intended to prevent abuses while not restricting the recovery of programming cost increases that would generally occur in the marketplace.<sup>29</sup> Thus, the Commission's first rule governing external costs for affiliated programming, what is now codified as section 76.922(f)(6), allows rate adjustments for affiliated programming "as long as the price charged to the affiliated system reflects either prevailing company prices offered in the marketplace to third parties (where the affiliated program supplier has established such prices) or the fair market value of the programming."<sup>30</sup> When adopting this rule, the Commission stated its intent to further examine the issue based on the record in its cost-of-service proceeding and to refine the requirements, if necessary.<sup>31</sup>

9. The Commission conducted this examination in the *Cost Order*, where it set forth requirements for affiliate transactions applicable to cable operators, like TWC, seeking to adjust regulated BST rates using the price cap methodology as well as those electing cost-of-service regulation.<sup>32</sup> Section 76.924(i) adopted in the *Cost Order* specifies that "[a]djustments on account of external costs . . . shall exclude any amounts not calculated in accordance with" the provisions of this section.<sup>33</sup> The section provides that charges both for assets purchased by or transferred to the regulated activity of the cable operator from affiliates and for services provided to the regulated activity by an affiliate "shall equal the invoice price if that price is determined by a prevailing company price."<sup>34</sup> If there is no prevailing company price, "the rules distinguish between the sale of an asset and the sale of a service."<sup>35</sup> The

<sup>26</sup> External costs are generally price changes caused by factors outside of the cable operator's control. *See Rate Order*, 8 FCC Rcd at 5786 ¶ 249.

<sup>27</sup> 47 C.F.R. § 76.922(e)(2)(ii), (f)(1)(v).

<sup>28</sup> *See Rate Order*, 8 FCC Rcd at 5788 ¶ 252. The Commission made an exception to the pass-through of programming costs as external costs by expressly limiting the pass throughs permitted for programming services affiliated with cable operators. The costs "attributable to the program services affiliated with such [vertically-integrated cable] systems" were initially "capped at the lesser of the annual incremental percentage increase in such costs or the GNP-PI". *See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation ("First Reconsideration")*, 9 FCC Rcd 1164, 1227 ¶ 113 (1993).

<sup>29</sup> *Id.*, 9 FCC Rcd at 1168.

<sup>30</sup> 47 C.F.R. § 76.922(f)(6). This rule was originally codified as 47 C.F.R. § 76.922(d)(3)(ix) (1994).

<sup>31</sup> *First Reconsideration*, 9 FCC Rcd at 1229 ¶ 114.

<sup>32</sup> *Cost Order*, 9 FCC Rcd at 4664-65 ¶ 262.

<sup>33</sup> 47 C.F.R. § 76.924(i).

<sup>34</sup> 47 C.F.R. § 76.924(i)(1), (3).

<sup>35</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for the Provision of Regulated Cable Services ("Final Cost Order")*, 11 FCC Rcd 2220, 2274 ¶ 132 (1996); *accord Cost Order*, 9 FCC Rcd at 4665 ¶ 262.

charges for assets acquired by the cable operator “shall be the lower of their cost to the originating activity of the affiliated group less all applicable valuation reserves, or their fair market value.”<sup>36</sup> The charges for services received by the regulated entity “shall be at cost.”<sup>37</sup> The Commission addressed the classification of programming as an asset or a service in the *Cost Order*, stating, “For the purpose of evaluating affiliate transactions that involve programming, we shall classify programming as an asset.”<sup>38</sup> This brought affiliated programming acquired by the cable operator under section 76.924(i)(1), allowing a cable operator to recover external costs for such programming at the lesser of its fair market value or costs.<sup>39</sup> Section 76.294(i)(1) qualifies the recovery of fair market value specified in section 76.922(f)(6) by taking the cable operator’s costs for affiliated programming into consideration.

10. In spite of this clear statement, TWC argues that Capital News 9 costs should not have been treated like an asset under section 76.924(i)(1), but should have been treated like a service under section 76.924(i)(3), with external cost recovery subject only to a showing of costs. TWC argues that Capital News 9 is a programming “service” rather than an “asset” because Capital News 9 involves more than the purchase of discrete programming: the TWC Affiliate producing Capital News 9 schedules and packages individual programs into a full-time channel, which it delivers as a finished product, and includes marketing and promotional support.<sup>40</sup> The Cable Division opposes this appeal, arguing that TWC has offered no support for its distinction between “programming” and a network “programming service” for ratemaking purposes.<sup>41</sup> Thus, the Cable Division argues, it reasonably treated Capital News 9 as an asset subject to 76.924(i)(1).<sup>42</sup>

11. We agree with the Cable Division that the showing required from TWC is the showing required for a programming asset under section 76.924(i)(1), including a showing of the asset’s fair market value if there is no prevailing company price in the marketplace. Nothing in the rules or their administrative history supports TWC’s argument to the contrary. The Commission talked about “programming services” and “program services” when first excepting affiliated programming from the external cost treatment for other programming.<sup>43</sup> The Commission referred to a regional sports network, a minority entertainment programming channel, and C-SPAN, a channel of public affairs programming, when first allowing external cost recovery based on a showing of the fair market value of affiliated programming when there was no fair market price for the programming; it did not exempt any types of

---

<sup>36</sup> 47 C.F.R. § 76.924(i)(1). Where the cable operator is the seller, the charge for asset sales “shall be determined at the higher of costs less all applicable valuation reserves, or estimated fair market value of the assets.” 47 C.F.R. § 76.924(i)(2).

<sup>37</sup> 47 C.F.R. § 76.924(i)(3).

<sup>38</sup> *Cost Order*, 9 FCC Rcd at 4666-67 ¶ 267; see *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation (“Sixth Reconsideration”)*, 10 FCC Rcd 1226, 1268 n.45\* (1994).

<sup>39</sup> *Cost Order*, 9 FCC Rcd at 4667 ¶ 267 (“Absent a prevailing company price, the cost of the programming shall equal the lower of the provider’s net book cost and the programming’s estimated fair market value.”)

<sup>40</sup> TWC Appeal at 6-7.

<sup>41</sup> Cable Division Opposition at 6; see 2004 Rate Order at 8 (“Whether a channel is a local news channel or a national entertainment channel, the channel would schedule the programming, transmit the signal, and market the station.”).

<sup>42</sup> Cable Division Opposition at 7.

<sup>43</sup> See *Rate Order*, 8 FCC Rcd at 5788 ¶ 252. See *supra* note 28.

programming from the rule although it was asked to do so by commenters.<sup>44</sup> The Commission made no distinction between discrete programs and channels or networks of programming purchased from affiliates when discussing the rule or in the rule itself.<sup>45</sup> When further considering affiliated programming in the *Cost Order*,<sup>46</sup> the Commission again made no distinction in the report and order or in section 76.924(i) between discrete programs and channels or networks of programming. TWC's argument that only some affiliated programming is subject to the safeguards against self-dealing is not consistent with the Commission's specific classification of programming as an asset subject to the safeguards in section 76.924(i)(1) and the Commission's intent to prevent unlimited pass throughs of programming costs from affiliates to consumers, and it lacks support in Commission precedent.

12. We recognize, as TWC argues,<sup>47</sup> that establishing a fair market value for Capital News 9 may be difficult, but the claim of difficulty does not excuse TWC from reasonably estimating the fair market value and explaining the basis for its estimate before recovering external costs for Capital News 9 on FCC Form 1240.<sup>48</sup> Indeed, although claiming difficulty for itself, TWC has suggested how the Cable Division might establish a fair market value.<sup>49</sup> But, TWC bears the burden of justifying its rates,<sup>50</sup> and is much more likely than the Cable Division to have experience in acquiring, selling, and valuing programming, knowledge of the kinds of factors that would affect the fair market value of the programming if offered for sale,<sup>51</sup> and access to information relevant for the valuation. The Cable Division's expectation that TWC should make that effort to comply with the Commission's rules in the first instance—and not pass its burden to the regulator—was not unreasonable. Nothing in the record shows that TWC made any effort to meet its burden, even though it had notice from the Cable Division's 2003 Rate Order and the Division's repeated requests for fair market value information that an estimate was required.<sup>52</sup>

---

<sup>44</sup> See *First Reconsideration*, 9 FCC Rcd at 1225 ¶ 110 & nn.193-94. Exemptions were sought for minority channels like BET and non-profit, non-stock program services. *Id.* at n.193.

<sup>45</sup> See 47 C.F.R. § 76.922(f)(6).

<sup>46</sup> See *Cost Order*, 9 FCC Rcd at 4663-68.

<sup>47</sup> TWC Appeal at 7-8.

<sup>48</sup> See *Cost Order*, 9 FCC Rcd at 4667 ¶¶ 267-68.

<sup>49</sup> TWC Appeal at 11. See *infra* note 51.

<sup>50</sup> 47 C.F.R. § 76.937.

<sup>51</sup> According to TWC, TWC affiliates have created regional news channels but, with one exception, do not sell these to unaffiliated cable operators. TWC Appeal at 7 n.13; Cable Division Opposition, Ex. C, Transcript of Public Hearing on June 8, 2004 ("Transcript") at 35 (TWC witness said "No" in response to question whether TWC attempted to sell Capital News 9 to any other multichannel provider); but see 2003 Rate Order at 4 (TWC "seeks to provide the channel to other cable operators"). Because it does not sell the channel to others, TWC argues it should not be subject to the parts of the Commission's affiliate transaction rules specifically applicable to programming for which there is no prevailing market price. Yet it suggests that value can be found from the information about increasing viewership and advertising sales it gave the Cable Division. *Id.* at 10. It also suggests the Cable Division can seek third party information. To the extent that such information is relevant to establishing market value, TWC can make the showing. But arguing that an affiliated program has "value" does not establish that the programming has fair market value and does not shift to the Cable Division TWC's burden of establishing a fair market value for the programming in the first instance.

<sup>52</sup> See 2003 Rate Order at 6; TWC Appeal, Ex. 2; Transcript, *passim*.

13. TWC argues, nonetheless, that the Cable Division cannot simply adjust its BST rate as if the disputed channel had no fair market value. It relies on *Maryland Cable Partners* in which the former Cable Services Bureau held that a franchising authority acted unreasonably in rejecting the cable operator's claimed federal and state tax rates for lack of supporting documentation and set the tax rates at zero without showing how it arrived at the zero rates.<sup>53</sup> The Cable Division argues that it acted reasonably under the circumstances in removing the external costs for Capital News 9 from TWC's rate calculation.<sup>54</sup> We agree.

14. Since the beginning of cable rate regulation, there has been a tension between cable operators and franchising authorities about the need for information supporting rate proposals, the reasonableness of franchising authority requests for information, and the adequacy of cable operator responses to information requests. In the *Third Reconsideration* cited by the Cable Division, the Commission stated that an operator that does not attempt to demonstrate the reasonableness of its rates "has failed to carry its burden of proof"; it gave franchising authorities "the authority to deem a non-responsive operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief," including, for example, "a prospective rate reduction and a refund . . . based on the best information available at the time."<sup>55</sup> The Commission added that franchising authorities must have this authority "to allow them to deal swiftly and effectively with non-compliant operators" to prevent subversion of the regulatory system, but that "such remedial power is not unbounded and must be exercised reasonably."<sup>56</sup> A franchising authority's decision will be affirmed if the franchising authority has provided a reasonable basis in its written decision for the action taken in response to the cable operator's noncompliance.<sup>57</sup>

15. The Cable Division's written decision provides that basis. It includes an analysis of the relevant Commission rules and precedent, explains why TWC's analysis is inconsistent with the rules, describes the Cable Division's efforts to elicit from TWC what the company believes are the factors relevant for determining fair market value, states that it sought information from TWC about other markets, and expresses concern that TWC's refusal to provide evidence of fair market value "is indicative of the Company's expectation that the value would be lower than its net book costs."<sup>58</sup> The Cable Division's decision to disallow TWC's claimed costs for its affiliated Capital News 9 channel is thoroughly explained based on the Commission's rules and is consistent with the Commission's warning in the *Cost Order*, that "[w]here cable operators have not demonstrated that their affiliate transactions meet the requirements of our affiliate transaction rules, disallowances shall be made by the . . . franchising authorities."<sup>59</sup> The Commission's rate rules allow external cost recovery for affiliated programming of the lesser of its fair market value or costs if no prevailing market price is established. Under the circumstances here, the Cable Division's decision not to assign a fair market value to one

---

<sup>53</sup> *Maryland Cable Partners*, 12 FCC Rcd 11951, 11953-54 (Cab. Serv. Bur. 1996).

<sup>54</sup> Cable Division Opposition at 9.

<sup>55</sup> *Third Reconsideration*, 9 FCC Rcd at 4347 ¶ 84.

<sup>56</sup> *Id.* ¶ 85.

<sup>57</sup> *Id.* at 4347 n.51 (citing *Rate Order*, 8 FCC Rcd at 5731).

<sup>58</sup> 2004 Rate Order at 10.

<sup>59</sup> *Cost Order*, 9 FCC Rcd at 4668 ¶ 271.

affiliated channel of programming when the cable operator bearing the burden has made no effort to do so in the first instance is not unreasonable.<sup>60</sup>

16. TWC argues without support or elaboration that the Cable Division's approach will likely result in the prescription of below-cost rates in violation of the takings clause of the Fifth Amendment.<sup>61</sup> Again, we disagree. Benchmark rates are not tied directly to costs,<sup>62</sup> although certain cost changes can be recognized through external adjustments to the benchmark rates. The issue here concerns TWC's failure to establish its entitlement to one external cost adjustment it claims; TWC has not alleged that the overall maximum permitted BST rate is confiscatory.<sup>63</sup> The Cable Division reasonably followed the Commission's rate rules, which were adopted to comply with the Communications Act requirement that the Commission develop regulations to ensure that the rates for the BST "are reasonable" and that the regulations be "designed to achieve the goal of protecting subscribers . . . from rates for the [BST] that exceed the rates that would be charged for the [BST] if such cable system were subject to effective competition."<sup>64</sup> TWC made no effort to show how the balance between consumer and investor interests in the statute, the Commission's implementing regulations, and the Cable Division's application of the regulations is precluded by the Fifth Amendment.<sup>65</sup>

17. TWC also argues that the Cable Division's approach "raises serious First Amendment concerns by entangling local governments in a subjective assessment of the 'value' of news and information programming that, in part, reports on the actions of those very governments."<sup>66</sup> We recognize

---

<sup>60</sup> TWC's failure to provide an estimate of the fair market value, as required by the Commission's rules, and the Commission's special treatment given to affiliated programming transactions distinguish this case from *Maryland Cable Partners*.

*See generally Final Cost Order*, 11 FCC Rcd at 2277 ¶ 140, rejecting arguments that the Commission permit a window for new programming. In doing so, the Commission said, "In a competitive market, programmers would not be able to subsidize new services with higher rates for competitive services. Similarly, in a regulated industry, programmers cannot expect regulated ratepayers to subsidize new programming ventures." *See generally also First Reconsideration*, 9 FCC Rcd at 1225 ¶ 110 & n.193 (commenters requested exemptions not included in the rule).

<sup>61</sup> TWC Appeal at 8; TWC Reply at 4.

<sup>62</sup> *Rate Order*, 8 FCC Rcd at 5755 ¶¶ 185, 187 (benchmark rates are based on the Commission's analysis of the rates of systems subject to effective competition); *First Reconsideration*, 9 FCC Rcd at 1175 ¶ 13. Benchmark rates are adjusted periodically for inflation. 47 C.F.R. § 76.922(e)(2)(i). Hardship rates are available to cable operators pursuant to 47 C.F.R. § 76.922(k) if the franchising authority determines that total revenues from cable operations measured at the highest level of the cable operator's cable service organization will not be sufficient to attract capital or maintain credit necessary to enable the cable operator to continue to provide cable service, the cable operator has prudent and efficient management, and adjusted charges on account of hardship will not be excessive in comparison to charges of similarly situated systems. TWC has not alleged hardship.

<sup>63</sup> *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313-16 (1989) (rejecting argument that ratemaking methodology must be examined piecemeal).

<sup>64</sup> 47 U.S.C. § 543(b)(1). If a cable system is not subject to effective competition, a franchising authority may regulate rates for the provision of basic cable service only "in accordance with the regulations prescribed by the Commission." *Id.* § 543(a)(2)(A).

<sup>65</sup> Although not the basis for our determination that the Cable Division was not unreasonable, we note that TWC and the TWC Affiliate have the opportunity to earn revenue on the channel through the sale of advertising. *See TWC Appeal* at 10.

<sup>66</sup> TWC Appeal at 8-9.



the sensitivity surrounding regulations affecting the first amendment rights of cable operators, but the rate regulations governing the external cost recovery of programming costs are content neutral. It is TWC that would link content to regulation by seeking what is in effect an exemption from the requirements of the Commission's rate regulations for news and information programming it acquires from its affiliate.<sup>67</sup>

#### IV. CONCLUSION

18. We conclude, based on the record before us, that the Cable Division was not unreasonable in denying TWC external cost treatment for its affiliated Capital News 9 channel. TWC bears the burden of justifying its rates. TWC made virtually no effort to estimate fair market value of its programming, a showing required by the Commission's rules. For this reason, we are denying TWC's appeal of the Cable Division's rate order.

#### V. ORDERING CLAUSE

19. Accordingly, IT IS ORDERED that the Appeal of Local Rate Order filed by Time Warner Cable Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Cable on Oct. 19, 2004 IS DENIED and the accompanying Request for Expedited Consideration IS DISMISSED as moot.

20. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief, Policy Division, Media Bureau

---

<sup>67</sup> Citing GAO, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, GAO-04-8 (Oct. 2003), at p. 29 ("GAO Study"), TWC argues, Appeal at 9 n.15, that GAO has determined that ownership affiliations had no influence on cable networks' license fees. The GAO conclusion was based on a study of the 90 cable networks carried most frequently on cable operator's BST or expanded-basic programming tier, 19 percent of which were majority owned by a cable operator. GAO Study at 27. GAO performed the same analysis on networks owned at least 20 percent by a cable operator or a broadcast network. *Id.* at 27 n.33. GAO's sample, which includes such widely distributed networks as TBS, TNT, CNN, AMC, and the Cartoon Network, *id.* at 28, does not appear to include channels like Capital News 9, which has limited distribution and, with one exception, is not offered to third parties. If TWC is asking for a reexamination of the premise for the Commission's external cost requirements for affiliated programming, that review is better addressed in a rulemaking proceeding based on a full record. *See generally Revisions to Cable Television Rate Regulations*, MM Docket No. 02-144, Notice of Proposed Rulemaking and Order, 17 FCC Rcd 11550 (2002) (examination of cable television rate regulations). Time Warner Cable has made an ex parte presentation in that proceeding about the external cost pass through of locally originated channels.